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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOANN FORD BOX,

Petitioner,

v.

A&P TEA COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a one-sentence assertion in defendant's summary judgment brief, unaccompanied by evidence, that "plaintiff cannot cite any facts to support her claim," put the burden on plaintiff to offer proof of every element of her *prima facie* case or face summary judgment?[1]

2. May a Court of Appeals affirm an otherwise erroneous grant of summary judgment by deciding that no factual dispute exists on an issue that was not addressed in the district court?

3. When an employer, without taking applications, discriminatorily fills a series of unannounced job openings, does an employee who has informed the employer of her desire to be promoted to this category of position satisfy the "application" requirement of a Title VII *prima facie* case?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit (No. 84-1732) were petitioner JoAnn Ford Box and respondent A&P Tea Company.

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[1] This Court has granted *certiorari* to consider a controlling case on this issue, *Celotex Corp.* v. *Catrett*, No. 85-198. ____ U.S. ____, 106 S.Ct. 342 (1985).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
ARGUMENT	9
A. The Court's Decision in *Celotex Corp.* v. *Catrett* Will Control This Case	9
1. If the Court Affirms in *Celotex*, the Decision Below Should Be Summarily Reversed and Remanded	10
2. If the Court Reverses in *Celotex*, *Box* Should Be Vacated and Remanded, Since the *Box* Summary Judgment Was Impermissible Even Under the View of Judge Bork's *Celotex* Dissent	10
B. The *Box* Opinion, in Conflict with Decisions of This Court and the Courts of Appeals, Endorses Appellate Fact-Finding and Will Increase the Workload of the District Courts	13
C. The Decision Below Conflicts With Other Circuits and With the Position of the EEOC on the Elements of a Title VII Plaintiff's *Prima Facie* Case Where an Employer Neither Announces Nor Takes Applications for the Opening in Question	15

PAGE

1. The Decision Conflicts With the Ninth and Eleventh Circuits' Holdings that the Question of "Applying" Is Irrelevant to a *Prima Facie* Case Where an Employer Takes No Applications 16

2. As a Means of Proving Injury, the "Would Have Applied" Requirement Is at Odds with the Fourth and Eighth Circuits 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

PAGE

Anderson v. *City of Bessemer City, North Carolina*, ____U.S. ____, 105 S.Ct. 1504 (1985) 13

Box v. *A&P Tea Co.*, 772 F.2d 1372 (7th Cir. 1985) ..... *passim*

Carmichael v. *Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984) 16, 17

Catrett v. *Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C.Cir. 1985), *cert. granted sub nom. Celotex* v. *Catrett*, ____ U.S. ____, 106 S.Ct. 342 (1985) 9, 10, 11, 12

Celotex Corp. v. *Catrett*, No. 85-198, ____ U.S. ____, 106 S.Ct. 342 (1985) 8, 9, 10, 11, 12

Cole v. *State of Arkansas*, 333 U.S. 196 (1944) 12

Cone v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947) 12

Easley v. *Empire, Inc.*, 757 F.2d 923 (8th Cir. 1985) 18

Ferguson v. *E.I. DuPont de Nemours and Co., Inc.*, 560 F.Supp. 1172 (D.Del. 1983) 18

Fountain v. Filson, 336 U.S. 681 (1949) 14, 15

Franks v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1970) 18

Furnco Construction Co. v. *Waters*, 438 U.S. 567 (1978) 19

Heirs of Fruge v. *Blood Services*, 506 F.2d 841 (5th Cir. 1975) 15

PAGE

Holsey v. *Armour & Co.*, 743 F.2d 199 (4th Cir. 1984) 18

Hormel v. *Helvering*, 312 U.S. 552 (1941) 15

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 18, 20

Johnson v. *New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952) 12

Mariash v. *Morrill*, 496 F.2d 1138 (2d Cir. 1974) .. 15

Paxton v. *Union National Bank*, 688 F.2d 552 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) 18

Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) ... 13

Reed v. *Lockheed Aircraft Co.*, 613 F.2d 757 (9th Cir. 1980) 16

Russell v. *United States*, 369 U.S. 749 (1962) 12

Singleton v. *Wulff*, 428 U.S. 106 (1976) 15

Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 16

Statutory Provisions

Rule 56, Federal Rules of Civil Procedure 2, 9

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000e *et seq* 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JoAnn Ford Box respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 772 F.2d 1372 and appears as Appendix A to this Petition.

The District Court's ruling granting summary judgment against petitioner was issued from the bench and is unreported. The transcript is attached hereto as Appendix B. The District Court's Order is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 5, 1985. On November 18, 1985, the Court of Appeals, two judges dissenting, denied petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc*. Appendix D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure, set forth in Appendix E, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, relevant portions of which are set forth in Appendix F.

STATEMENT OF THE CASE

In 1979 petitioner JoAnn Ford Box sued the A&P Tea Company, alleging that A&P had violated Title VII of the Civil Rights Act of 1964 by limiting her and other women to low-paid positions in its grocery stores through discrimination in job assignment, training, promotion, and transfer. Jurisdiction of the suit rested on 42 U.S.C. § 2000e-5. The district court granted summary judgment against Ms. Box. The Court of Appeals for the Seventh Circuit, though rejecting the district court's reasons, nonetheless affirmed that summary judgment. This petition seeks review of that affirmance.

Factual Background. The record evidence showed that despite having a predominantly female work force, A&P filled most supervisory job categories in its Chicago Division stores almost exclusively with men (132-3, 140-1, 149-50).[2] For

[2] Citations are to the pages of the record appendix filed with the Court of Appeals.

example, in 1980, when over 50% of the stores' work force was female, 97% of the assistant managers were men, 98% of the produce managers were men, and 99% of the frozen food department heads were men (140). From 1975 to 1980, when over 50% of A&P's grocery clerks were women (149-150), only one woman moved from grocery clerk to assistant manager, while 43 men received such promotions (153). Men got 89% of the promotions to produce department head, dairy department head, and frozen food department head (153). A&P itself noted that its female employees were confined to a limited path of progression. A&P's 1978 "affirmative action plan" (135) states:

> Most of the women are at the Head Cashier level. This seems to be the height of a woman's progression, movement into the store manager, department heads and assistant managers positions are [*sic*] limited.

The record evidence showed no objective reasons for A&P's preference for men over women for these supervisory positions. There were no years of service requirements, no educational standards, no tests, and no written standards or guidelines that governed promotions, assignments, and transfers (69-70, 80, 99, 114-120, 126-8, 159, 212-4). Any employee in any Chicago Division store was eligible to be promoted and transferred to any of the supervisory jobs in the Division (117-8).

Promotion, assignment, and transfer decisions were made by male managers exercising unbounded discretion, simply handpicking the employees they liked (69-70, 80, 82, 99, 114-120). Substantial anecdotal evidence indicated that A&P's male managers thought women were unsuited for jobs held by men (34, 179, 180, 191).

The record showed that women at A&P did not receive notice of supervisory job openings or have an opportunity to apply for them. Openings were not posted and applications

were not taken (71-2, 80, 82, 99, 115, 126-8, 214). Typically, women found out that a supervisory position was being filled when a new male employee began to work at the job (69-70, 71-2, 80, 99, 214).

The record contained evidence that petitioner JoAnn Box had been individually harmed by A&P's preference for men over women. Ms. Box, a black woman, worked for A&P as a cashier and assistant bookkeeper from 1965 to 1978 (50-63). The record evidence showed that Ms. Box repeatedly asked her store managers and supervisors for a promotion or training so she could be promoted (54). At first she concentrated on the bookkeeper position. In 1976, Ms. Box's store manager told her that A&P's bookkeeper school had closed and she would not receive bookkeeper training (34). Ms. Box told her store manager that in that case she wanted to receive training so she could advance to some other position, such as assistant store manager (34). Ms. Box's store manager told her that he didn't think that would be possible. It was the Company's policy to usually promote women only to bookkeeper, he told her (34).

In response to this, Ms. Box filed an amended EEOC charge in July, 1976 (41).[3] That charge complained of sex and race discrimination and specifically mentioned her not having received the job of assistant manager (33, 35, 46). She was not promoted to assistant manager, and A&P continued to fill its assistant manager positions only with men (153). In 1979, Ms. Box filed this Title VII class action.

The Proceedings Below. In the district court, A&P moved for summary judgment as to Ms. Box's sex discrimination claim on two grounds. First, it alleged that she had failed to file an EEOC charge of sex discrimination. Second, it asserted that Ms. Box could not make out a *prima facie* case of sex discrimination because all the bookkeeper jobs which Ms. Box

[3] Ms. Box had filed her original EEOC charge in 1975, alleging race discrimination in filling bookkeeper positions (42-44).

had sought had been filed by women, not men. On February 15, 1984, the district court agreed with both arguments and granted summary judgment to A&P on the sex discrimination claim. Ms. Box appealed.

On September 5, 1985, the Court of Appeals affirmed. *Box* v. *A&P Tea Co.*, 772 F.2d 1372 (7th Cir. 1985). However, it rejected both of the district court's reasons for summary judgment. It found evidence that Ms. Box had filed an EEOC sex discrimination charge, making summary judgment on that issue inappropriate. 772 F.2d at 1375. And it held that even if all bookkeeper positions had been filled by women, that could not justify summary judgment. It noted that Ms. Box was alleging sex discrimination not just in filling bookkeeper positions but also in filling the assistant manager position. A&P had offered no evidence in the district court about assistant manager positions, and Ms. Box's evidence showed that over a three-year period, A&P had promoted 27 male and no female grocery clerks to assistant manager. 772 F.2d at 1375.

Instead of reversing and remanding, however, the Court of Appeals, over a vigorous dissent, affirmed. It did so in two steps. First, it held that Ms. Box—the party *opposing* summary judgment—had the burden of offering evidence in the district court showing that she could prove her *prima facie* case. According to the majority, A&P had imposed this burden on plaintiff simply by asserting in one of its summary judgment briefs that Ms. Box "could not cite any facts to support [her] claim of sex discrimination":

> In the district court, A&P argued in its reply memorandum that Box could not "cite any facts to support the claim" of sex discrimination; A&P cited a section of its initial memorandum that included the statement "when the undisputed facts which emerge from a plaintiff's deposition show that she cannot show a *prima facie* case . . ., summary judgment is appropriate." This argument, although not made as elaborately as the two arguments relied on by the district

> court in granting the motion for summary judgment, gave Box a fair opportunity to submit evidence showing that she could establish a *prima facie* case.

772 F.2d at 1376.[4]

Second, the majority held, for the first time in any appellate opinion, that when an employer has filled openings without announcing them and without accepting applications, a Title VII plaintiff's *prima facie* case must include proof that she would have applied for the openings had the employer made their existence known to her, and must identify the particular openings for which she would have applied. Since Ms. Box had offered no such statement in the district court, the majority asserted that she had failed "to set forth specific facts [in response to the motion for summary judgment] showing that she could . . . establish a *prima facie* case." 772 F.2d at 1377.

According to the majority, this "would have applied" requirement was not satisfied by evidence in the record that Ms. Box had repeatedly asked her store manager for training to be promoted to assistant manager and that she had complained in a 1976 EEOC charge of not being promoted to assistant manager. 772 F.2d at 1377. According to the majority, that evidence only amounted to a "vague interest in the assistant manager position" and it held that "after four years of discovery, Ms. Box has failed to identify for which of these twenty-seven positions she would have applied." 772 F.2d at 1377.[5]

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[4] The quoted language suggests that A&P's motion for summary judgment had cited Ms. Box's deposition to argue that she could not make out a *prima facie* case. That is incorrect. A&P's sole citation to Ms. Box's deposition appeared in a footnote dealing with the scope of her EEOC charge (App. J-4). Ms. Box's deposition was so irrelevant to the proceedings below that neither party designated it for the record on appeal. In an effort to find a basis to affirm summary judgment, the Court of Appeals, after oral argument, ordered Ms. Box's deposition to be made part of the record on appeal. (App. G).

[5] The dissent denounced "the increasing use of summary judgment when the posture of the case calls for a trial." 772 F.2d at 1381. It cited the extensive statistical and anecdotal evidence in the record that A&P chose only men for its supervisory store positions, and noted that Ms. Box had repeatedly expressed interest in advancing to assistant manager. 772 F.2d at 1380-1.

Ms. Box petitioned for reconsideration or rehearing *en banc*. She pointed out why she had not "identified for which of these twenty-seven positions she would have applied": A&P had never raised that issue below. In the district court, A&P had made no argument at all about assistant manager jobs.[6] Thus, the majority had let a nonspecific, nonevidentiary assertion in a brief impose a burden on Ms. Box to offer proof of an element of her case on which A&P had offered no argument or evidence.

The Equal Employment Opportunity Commission, until then a stranger to the proceedings, filed a brief *amicus curiae* in support of Ms. Box's petition for reconsideration or rehearing *en banc*. The EEOC argued that the majority's "would have applied" requirement misstated the standard for establishing a Title VII *prima facie* case. It also argued that by deciding an issue that was not raised below, the majority had misused summary judgment procedures. The EEOC warned that the majority's decision "would seriously hamper both public and private enforcement efforts within this Circuit." (Appendix H.) On November 18, 1985, the Court of Appeals, two judges dissenting, denied Ms. Box's petition.

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[6] All the arguments and evidence A&P presented in the district court are included in its motion and two memoranda, attached (Appendices I, J, and K hereto).

REASONS FOR GRANTING THE PETITION

There are three reasons to grant *certiorari*. First, this Court has granted *certiorari* in a controlling case, *Celotex Corp.* v *Catrett*, ____ U.S. ____, 106 S.Ct. 342 (1985). In *Celotex*, as here, the issue is whether a district court, without any evidentiary showing by defendant, may require plaintiff to provide evidence to support her claim or face summary judgment. Second, the decision below conflicts with the holdings of this Court and other Circuits on an important question of appellate review: whether a court of appeals, after finding erroneous a district court's reasons for granting summary judgment, may affirm that judgment on factual grounds that have not been litigated in the district court. Third, the decision below conflicts with decisions of other Circuits, and with the position of the Equal Employment Opportunity Commission, on the elements of a Title VII plaintiff's *prima facie* case where an employer has filled a job opening without announcing or accepting applications for it.

ARGUMENT

A. The Court's Decision in *Celotex Corp.* v. *Catrett* Will Control This Case

On November 4, 1985, this Court granted *certiorari* to review *Catrett* v. *Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C.Cir. 1985), *cert. granted sub nom. Celotex Corp* v. *Catrett*, ____ U.S. ____, 106 S.Ct. 342 (1985). Whether this Court affirms or reverses in *Celotex*, the decision in *Box* should be vacated and remanded for appropriate proceedings.

The issue in *Celotex*, as here, is whether—and under what circumstances—a district court, *without any evidentiary showing by defendant*, may require plaintiff to offer evidence on an element of her case or face summary judgment as a consequence. *Celotex* was a products liability case in which plaintiff alleged that her deceased husband was injured through exposure to defendant's asbestos product. The defendant moved for summary judgment. Without offering evidence itself, defendant argued that plaintiff would be unable to offer admissible evidence of her husband's exposure to defendant's asbestos. The trial court demanded that plaintiff produce such evidence, and when she failed to do so, it entered summary judgment for defendant.

A divided Court of Appeals reversed. The majority held that F.R.Civ.P. 56 requires the moving party to support a summary judgment motion with evidence. Since defendant had offered no evidence on the exposure issue, the Court found summary judgment improper. 756 F.2d at 185. Judge Bork dissented. He acknowledged that F.R.Civ.P. 56 requires a defendant to make a "showing" to support its summary judgment motion, but he asserted that that showing need not always be made by evidence. 756 F.2d at 188. Judge Bork argued that though the *Celotex* defendant had offered no evidence, it had made a showing that plaintiff was unlikely to have admissible evidence on the exposure issue. In his view, this showing was sufficient to require plaintiff to produce evidence of exposure or face summary judgment.

Whether this Court affirms or reverses in *Celotex*, it should vacate and remand *Box*. The *Box* summary judgment was equally impermissible under the majority and dissenting views in *Celotex*.

1. If the Court Affirms in *Celotex*, the Decision Below Should be Summarily Reversed and Remanded

If this Court affirms in *Celotex*, *Box* must be reversed and remanded to the district court. The majority in *Box* affirmed summary judgment because it felt Ms. Box had failed to show that she would have applied for assistant manager positions had they been announced. It is undisputed, however, that A&P's motion for summary judgment offered no evidence or argument on this issue. (Apps. I, J, K.) All A&P offered was a statement in a brief to the effect that it "believes Box cannot establish a prima facie case." 772 F.2d at 1376. Hence the *Box* majority demanded that Ms. Box provide evidence on an issue as to which A&P made no evidentiary showing. This is what the majority of the District of Columbia Circuit held impermissible in *Celotex*. If the Court affirms *Celotex*, *Box* should be summarily reversed and remanded.

2. If the Court Reverses in *Celotex*, *Box* Should Be Vacated and Remanded, Since the *Box* Summary Judgment Was Impermissible Even Under the View of Judge Bork's *Celotex* Dissent

If this Court accepts Judge Bork's dissenting view in *Celotex* and reverses, it will be equally necessary to vacate and remand *Box*. For two reasons, *Box's* summary judgment is just as inconsistent with the *Celotex* dissent as with the *Celotex* majority opinion.

a. *A&P Made No Showing.* Judge Bork's *Celotex* dissent emphasizes that before a district court requires a plaintiff to produce evidence on a summary judgment motion, the defend-

ant must make a *showing*. The showing need not be through evidence, but it must be sufficient to raise a question on plaintiff's ability to prove a required part of her case. 756 F.2d at 188. A&P made no "showing" of any kind. A one-sentence statement in a brief to the effect that A&P "believes Box cannot establish a *prima facie* case" is not a "showing." It offers a district court no reason to believe that Ms. Box lacks any required evidence. Suppose, for example, that Ms. Box had moved for summary judgment with nothing more than a brief that stated, "A&P has no defense." No court would hold such a sentence to be a "showing" that required A&P to provide evidence or face summary judgment.

b. *A&P Gave Ms. Box No Notice of the Issue on Which Evidence Was Demanded of Her.* As Judge Bork's dissent emphasized, a district court cannot require a plaintiff to produce evidence on a summary judgment motion without giving her notice of the specific factual issue on which evidence is demanded. 756 F.2d at 189, 191. In *Celotex*, the plaintiff was told the precise issue she was expected to address: her husband's exposure to asbestos.

Ms. Box had no such notice, and the *Box* majority held that it need not be given. The *Box* majority held that to shift the initial burden of producing evidence from A&P to plaintiff, A&P provided adequate notice of the issue on which evidence was demanded simply by asserting in a brief that it "believes Box cannot establish a prima facie case." 772 F.2d at 1376.

This radical position is contrary not only to Judge Bork's *Celotex* dissent, but to due process. The initial burden of providing evidence on a summary judgment motion cannot be imposed on plaintiffs without specific notice of the issue on which proof is demanded. It may not be unfair to impose that burden when a defendant identifies the specific factual issue on which it challenges plaintiff to produce evidence, as defendant did in *Celotex*. But it is utterly unfair to impose that burden, as the Court of Appeals did in *Box*, when all defendant has done

is to state in a brief that plaintiff "cannot cite any facts to support [her] claim."[7] Due process requires more specific notice than that. *See, e.g., Cole* v. *State of Arkansas*, 333 U.S. 196, 201 (1948); *Russell* v. *United States*, 369 U.S. 749, 766-768 (1962); *Johnson* v. *New York, N.H. & H.R. Co.*, 344 U.S. 48, 51 (1952); *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217-218 (1947).

Specific notice is especially critical in that the parties do not always agree as to what the elements of a plaintiff's *prima facie* case are, as this case shows. Unless the defendant specifies the factual issues on which proof is demanded from plaintiff, a plaintiff is likely to omit proof on a particular element which she has no reason to believe forms part of her *prima facie* case. That happened here. As discussed below, at the time of the proceedings in the district court, there was no established requirement that Ms. Box prove in her *prima facie* case that she "would have applied" for assistant manager openings. *Box* is the first appellate opinion to impose such a requirement, and other Circuits disagree with its analysis.

In short, whether this Court affirms or reverses in *Celotex*, it should vacate and remand *Box*, for *Box* is inconsistent with both the majority and dissenting views of the *Celotex* Court of Appeals.

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[7] In this case, for example, if A&P had specifically raised the "would have applied" issue in the district court, Ms. Box could and would have filed an affidavit stating that she had been interested in assistant manager positions and would have applied for specific openings if A&P had made their existence known. Such an affidavit would have been consistent with the evidence in the record, acknowledged by the majority, that Ms. Box had shown interest in assistant manager positions.

B. The *Box* Opinion, in Conflict with Decisions of This Court and Other Courts of Appeals, Endorses Appellate Fact-Finding and Will Increase the Workload of the District Courts

The *Box* decision holds that after finding erroneous a district court's grounds for summary judgment, a court of appeals may affirm that summary judgment on factual grounds that were not specifically litigated in the district court. Because this holding will cause serious problems of judicial administration, and because it conflicts with the decisions of this Court and other Courts of Appeals, *certiorari* should be granted.

The *Box* holding presents two threats to sound judicial administration. First, it results in improper appellate fact-finding—a practice that has prompted this Court's repeated intervention in recent terms. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-2 (1982); *Anderson* v. *City of Bessemer City, N.C.*, ___U.S. ___, 105 S.Ct. 1504, 1512 (1985). When a court of appeals affirms a summary judgment on factual grounds that have not been specifically litigated below, it is making an initial finding of fact, which should be the district court's function. Moreover, the court of appeals is making such a finding on an inappropriate record. It is not reviewing the complete evidentiary record of a litigated issue, but rather a skeletal record, compiled for a summary judgment motion that had nothing to do with the issue on which the court of appeals is making its finding.[8] Such a procedure usurps the fact-finding responsibilities of district courts. In this case, for example, the district court never had a chance to consider the factual issue resolved by the Seventh Circuit—whether Ms. Box would have applied for assistant manager vacancies had she known of them—and no factual record was built on this issue by either party.

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[8] Indeed, as noted earlier (n.4), in this case the majority not only based its finding on a skeletal record, but relied on evidence—Ms. Box's deposition—that had not been considered at all by the district court on the question of Ms. Box's *prima facie* case.

Second, the Seventh Circuit's procedure, unless condemned by this Court, will increase the burden on district courts facing summary judgment motions. If a Court of Appeals may affirm a summary judgment on factual grounds that have not been specifically raised in the district court by defendant, a plaintiff opposing a summary judgment motion will have no choice but to offer evidence and argument on every element of her case, even though defendant has not put them in issue. Under the Seventh Circuit's practice, summary judgment motions will become cluttered with evidence and arguments on issues that defendants have not raised, because prudent plaintiffs must protect themselves from the possibility that a court of appeals will affirm on a factual ground that was not raised by defendant in the district court.

Aside from the threat it poses to sound judicial administration, the decision below conflicts with this Court's 336 decisions of other Circuits. In *Fountain* v. *Filson*, 336 U.S. 681 (1949), this Court condemned appellate-level summary judgments on factual issues not specifically litigated in the district court:

> [H]ere the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court.
>
> * * *
>
> There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

Fountain v. *Filson*, 336 U.S. 681, 683 (1949). *See also Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976); and *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941). The Seventh Circuit's procedure likewise conflicts with other Circuits that have held that when a court of appeals finds a summary judgment erroneous, it may not affirm that summary judgment on other factual grounds unless these factual grounds were specifically litigated in the district court. *Heirs of Fruge* v. *Blood Services*, 506 F.2d 841, 844 (5th Cir. 1975); *Mariash* v. *Morrill*, 496 F.2d 1138, 1145 (2d Cir. 1974).

By reversing the Seventh Circuit, the Court will resolve this conflict among Circuits. It will eliminate improper appellate displacement of district court fact-finding, and it will protect district courts from the needless inflation of the scope of summary judgment motions.

C. The Decision Below Conflicts With Other Circuits and With the Position of the EEOC on the Elements of a Title VII Plaintiff's *Prima Facie* Case Where an Employer Neither Announces Nor Takes Applications for the Opening in Question

The decision below conflicts with other Circuits, and with the position of the EEOC, on the elements of a Title VII *prima facie* case where an employer has filled openings without accepting applications for them or making the existence of those openings known. *Box*'s new requirement of showing that the plaintiff would have applied for a specific vacancy clashes with other Circuits' holdings, and with this Court's prior decisions. This conflict demands this Court's intervention, for as the EEOC told the Seventh Circuit, *Box*'s requirement will "seriously hamper both public and private enforcement efforts" under Title VII. (App. H.)

1. The Decision Conflicts With the Ninth and Eleventh Circuits' Holdings that the Question of "Applying" Is Irrelevant to a *Prima Facie* Case Where an Employer Takes No Applications

The Ninth and Eleventh Circuits have held that when an employer fills openings without announcing or taking applications for them, the question of applying for the job is irrelevant to a Title VII *prima facie* case. *Carmichael* v. *Birmingham Saw Works*, 738 F.2d 1126, 1132-1133 (11th Cir. 1984); *Reed* v. *Lockheed Aircraft Co.*, 613 F.2d 757, 761 (9th Cir. 1980). *Box* conflicts with these Circuits' rules by reinserting the "application" requirement in another guise. Even though an employee like Ms. Box cannot prove that she applied for jobs for which no applications were allowed, the majority requires Ms. Box to prove in her *prima facie* case that she *would have applied* for the jobs had she known about them, and to identify the specific jobs she would have applied for.

The Ninth and Eleventh Circuits are right, while *Box* is wrong. The reason is clear: the *Box* majority's "would have applied" requirement makes a Title VII plaintiff's *prima facie* case prove a fact that has nothing to do with discrimination.

The purpose of the Title VII *prima facie* case is to raise a presumption of deliberate discrimination even though direct evidence is lacking. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-254 (1981). When a qualified employee unsuccessfully applies for a job, the fact that she applied contributes to this presumption. It shows that the employer, specifically knowing that a qualified female (or black) employee wanted the job, decided to turn her or him down. That raises a question of why that happened, and requires explanation from the employer.

But where an employer like A&P takes *no* applications and makes it impossible for employees to express interest in specific openings, the question of applying becomes irrelevant to pro-

ving deliberate discrimination. *Carmichael* v. *Birmingham Saw Works, supra,* 738 F.2d at 1132-1133.

Since "applying" is irrelevant in a system in which no applications are taken, the *Box* opinion invents a substitute for the "application" requirement: the plaintiff is to show that she "would have applied" for a vacancy had she known about it. But such "would have applied" proof is irrelevant to proving that discrimination has occurred. Alleging that she would have applied for a vacancy sheds no light on whether A&P was actually discriminating against women. Such discrimination is proved only with facts about what the employer *did*, using a system that dispensed with applications. Ms. Box offered such facts. She produced strong statistical proof that sex played a role in how A&P picked assistant managers and other supervisors. She also offered anecdotal evidence that she and women who approached A&P about promotion to such positions were told that they were reserved for men. This proof raised a strong presumption of discrimination. Showing that Ms. Box would have applied for assistant manager positions had she known of them would have added nothing to that presumption.

In short, the majority's new "would have applied" requirement conflicts with the Ninth and Eleventh Circuits, which recognize that the issue of applying is irrelevant to the *prima facie* case when an employer takes no applications.

2. As a Means of Proving Injury, the "Would Have Applied" Requirement Is at Odds with the Fourth and Eighth Circuits.

Since it contributes nothing to proof of deliberate discrimination, the only conceivable purpose of the majority's "would have applied" requirement is to show injury. The "would have applied" requirement appears aimed at showing that Ms. Box was personally affected by A&P's unannounced

handpicking of men for supervisory positions.[9] But even as a means of proving injury, the Seventh Circuit's "would have applied" requirement conflicts with other Circuits' holdings and with common sense.

The Fourth and Eighth Circuits have held that where an employer does not post openings and does not have a formal application process, the plaintiff need only show that she informally expressed an interest in promotion to the category of position in question. That is enough to establish, *prima facie*, that he or she was affected by a discriminatory pattern of selection. *Holsey* v. *Armour & Co.*, 743 F.2d 199, 208-209 (4th Cir. 1984) ("casual inquiry" sufficient); *Paxton* v. *Union National Bank*, 688 F.2d 552, 568 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Easley* v. *Empire Inc.*, 757 F.2d 923, 930 (8th Cir. 1985). *And see Ferguson* v. *E.I. duPont de Nemours and Co., Inc.*, 560 F.Supp. 1172, 1192-1193 (D.Del. 1983) ("generalized expression of interest" sufficient).

The *Box* majority rejects this rule. It acknowledges that Ms. Box repeatedly indicated interest to her store manager in advancing to the assistant manager position, and that her 1976 EEOC charge complained of her failure to be promoted to

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[9] In addition to other errors, the *Box* majority erred in imposing, at the liability stage, a burden on Ms. Box to show that she had been individually injured by A&P's discriminatory policy. This was a classic "pattern or practice" case. In such a case, plaintiff's *prima facie* case at the liability stage is simply to show that "unlawful discrimination has been a regular procedure or policy followed by an employer." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 772-773 (1976). At that stage, proof of injury to individual persons is expressly *not* required. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 360-361 (1977). Even the skeletal record on A&P's summary judgment motion showed that Ms. Box had strong evidence of such a discriminatory procedure. By going further, and requiring Ms. Box to offer evidence of individual injury to herself in her *prima facie* case, the *Box* majority imposed a burden that this Court holds she does not have.

assistant manager. 772 F.2d at 1377. But the majority, in conflict with the cases cited above, finds such expressions of interest in promotion to assistant manager insufficient, and makes the plaintiff engage in the hypothetical exercise of alleging she would have applied for specific, identified assistant manager openings had A&P done something it did not do—make those openings known to her.

For three reasons, the rule of the Fourth and Eighth Circuits makes sense, while the *Box* rule makes none. First, the Fourth and Eighth Circuits make a plaintiff prove injury by showing what she actually did, while the *Box* rule makes her prove injury with self-serving, conclusory statements about what she would have done. A plaintiff who shows that she repeatedly told her employer of her desire to be promoted to assistant manager has provided credible evidence, through her actions at the time, that she wanted to be an assistant manager and would have competed for assistant manager jobs if the employer's no-announcement, no-application system had not sealed off such competition. Such a plaintiff provides far stronger proof of injury than a plaintiff who, as *Box* demands, intones years after the fact that she would have applied for a particular vacancy.

Second, when Ms. Box asked her store manager for promotion to assistant manager, she did everything that could reasonably have been expected of her to obtain such a position. Because A&P did not announce or take applications for its vacancies, Ms. Box had no way at the time to indicate her interest in assistant manager jobs, other than by the actions she took. *Box* holds that a plaintiff fails to offer sufficient proof of injury even though she proves that she did "everything within [her] power to apply for employment." *Furnco Construction Co.* v. *Waters*, 438 U.S. 567, 576 (1981). This makes no sense.

Third, the *Box* rule treats females differently from males. In order to be considered for promotion on the same basis as the male clerks who were promoted, Ms. Box should have had

to do precisely what the men had to do—nothing. Instead, the *Box* rule makes her prove that she would have engaged in an act—applying for a job—that was not required of the 27 men lucky enough to be tapped by A&P for these assistant manager jobs.[10]

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[10] The Court of Appeals' "would have applied" requirement appears to be a misapplication of the *Teamsters* solution to the problem of the deterred applicant. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). In *Teamsters*, the employment system required applications, but the discrimination was so blatant that many blacks deemed it futile to apply. This Court held that once liability was established in the "Stage I" proceedings, such persons could recover damages in "Stage II" if they could show that they would have applied but for the employer's pervasive discrimination. 431 U.S. at 367-8.

In this circumstance, the "would have applied" requirement makes sense, because it explains why the plaintiff failed to participate in a real-life application system that all were required to use. In the *Box* case, the "would have applied" requirement makes no sense, because the employer had no application system, and males were not required to apply. There is no reason to make Ms. Box explain why she did not apply for openings when A&P did not accept applications.

Moreover, even in the "deterred applicant" case, *Teamsters* does not require the deterred applicant to identify, as *Box* does, the specific vacancy for which he would have applied. Instead, this Court noted that an employee can show that he "would have applied" simply by proving that he took general actions at the time that were consistent with the conclusion that he would have applied for the type of job in question. 431 U.S. at 371 n.58. This holding is analogous to the Fourth and Eighth Circuits' holdings that where an employer accepts no applications, an employee need only demonstrate that she expressed general interest at the time in promotion to the kind of position at issue.

As the EEOC, *amicus curiae*, told the Seventh Circuit, it is important to resolve the conflict *Box* has created. Many employers fill positions without announcing them or taking applications for them, and substantial Title VII litigation arises from this practice. This Court should grant *certiorari* to eliminate the conflict among Circuits about the *prima facie* case in this recurring situation.

CONCLUSION

For the reasons stated above, a writ of *certiorari* should be granted to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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